DATO' TEONG TECK KIM & 2 ORS.

v.

DATO' TEONG TECK LENG

COURT OF APPEAL, KUALA LUMPUR
DATO' HJ. LAMIN BIN HJ. MOHD. YUNUS PCA
DATO' HJ. ABU MANSOR BIN ALI JCA
DATO' AHMAD FAIRUZ BIN DATO' SHEIKH ABDUL HALIM J
[CIVIL APPEAL NO. W-04-69-95]
27 NOVEMBER 1995

ARBITRATION: *Arbitrator - Jurisdiction - Objection raised that arbitrator had no jurisdiction to entertain application - Whether trial Judge dutybound to make a positive ruling - Failure to rule - Whether a serious error - Objector did not adequately respond to claim that arbitrator had jurisdiction - Whether prejudicial to the other party.*

ARBITRATION: *Arbitrator - Jurisdiction - Interpretation of clauses in agreement - Whether proper function of arbitrator - Whether decision by arbitrator thereof final - Absence of error of law on face of award - Whether trial Judge entitled to substitute arbitrator's interpretation of agreement with that of his own - Substitution thereof - Whether improper - Whether tantamount to usurpation of arbitrator's function.*

WORDS & PHRASES: *"Dispute".*

The appellants and the respondent were brothers. On 2 October 1993, to settle a pending proceeding between them, they signed a Compromise Agreement (the agreement) by which they sought to bring the said proceeding to an end. While attempting to effectuate the agreement, however, a dispute arose in respect of the selection and appropriation of the companies listed in Schedule 1 therein. Accordingly, pursuant to clause 4.5 of the agreement, the dispute was referred to one Dato' David Teoh for arbitration. Before the arbitrator the respondent raised an objection that the arbitrator had no jurisdiction to entertain the application. The objection was dismissed whereupon the arbitrator proceeded to give an award in favour of the appellants, awarding in effect five companies and a certain property in Kuala Lumpur to them. The respondent, aggrieved by the award, applied to the High Court to have it set aside. The learned Judge, after giving the agreement a fresh interpretation of his own, held that the arbitrator had erred in several matters in particular in relation to the correct interpretation of clauses 4.2 and 4.5 of the agreement, and consequently set the award aside.

The appellants appealed, and argued in essence that the interpretation of the agreement fell squarely within the jurisdiction of the arbitrator and that it was therefore not open for the learned Judge to have substituted the same. The

respondent submitted that the arbitrator had no jurisdiction to arbitrate and therefore the award had been properly set aside by the Court below.

Held:

Per Abu Mansor Ali JCA (delivering the judgment of the Court):

[1] Looking at the agreement in its entirety there is finality in all clauses except clause 4.2 to be read with clause 4.5. The parties were thus fully aware that there could be disputes in their implementation of that clause. They therefore provided for its resolution of that eventuality in clause 4.5 that, in the event of dispute surfacing they shall go to a named arbitrator whose decision shall be final. Giving a clear meaning to clause 4.2 and reading it with clause 4.5, it is beyond doubt that there was dispute requiring a resolution in accordance with clause 4.5 thereof.

[2] The respondent's objection to the arbitrator's exercise of jurisdiction was to say the least feeble. On top of that, there was a clear failure on the part of the respondent to apply for a stay of the arbitration, or to state a case of absence of jurisdiction before the learned Judge beyond a general submission that the arbitrator had no such jurisdiction. By conduct, the respondent had also submitted to the jurisdiction of the arbitrator by making submission before him. Indeed the evidence was overwhelming that there was submission of this dispute to the named arbitrator.

[3] The learned Judge had erred in not making a positive ruling in his judgment that the arbitrator had or had no jurisdiction. The learned Judge was obliged to pose the respondent the question, and to require the respondent to discharge that burden, as to why the matter should not be referred to arbitration. In any case, the respondent's failure to adequately respond and to properly challenge the appellants' claim that the arbitrator had jurisdiction to arbitrate, prejudiced the appellants and prevented them from contesting that important issue of jurisdiction.

[4] The learned Judge had also erred in failing to answer the respondent on the issue of jurisdiction. Taking all the circumstances, if the learned Judge had applied his attention to the question of whether the arbitrator had jurisdiction, in all probability his answer would be that the arbitrator had been conferred with jurisdiction to arbitrate and that issue was not for him.

[5] There was nothing on the face of the award indicating any error of law on the part of the arbitrator. The learned Judge, hence, had also erred in that he had usurped the function of the arbitrator in the absence of any error of law on the face of the award.

[Appeal allowed. Judgment of Court below set aside. Award of arbitrator restored]

***[Bahasa Malaysia** Translation of Headnotes]*

***TIMBANGTARA:** Penimbangtara - Bidangkuasa - Bantahan dibangkitkan bahawa penimbangtara tidak mempunyai bidangkuasa untuk melayan permohonan - Samada Hakim perbicaraan terikat oleh kewajipan untuk membuat keputusan yang positif - Kegagalan untuk memutuskan - Samada satu kesilapan yang serius - Pembantah tidak memberikan tindak-balas yang secukupnya kepada tuntutan bahawa penimbangtara mempunyai bidangkuasa - Samada memudaratkan pihak yang lain.*

***TIMBANGTARA:** Penimbangtara - Bidangkuasa - Pentafsiran fasal-fasal dalam perjanjian - Samada merupakan fungsi wajar penimbangtara - Samada keputusan oleh penimbangtara adalah muktamad - Ketiadaan kesilapan di sisi undang-undang pada permukaan award - Samada Hakim perbicaraan berhak untuk menggantikan pentafsiran penimbangtara mengenai perjanjian dengan tafsirannya sendiri - Penggantiannya - Samada tidak wajar - Samada membawa kepada perampasan fungsi penimbangtara.*

***PERKATAAN & ISTILAH:** "Pertikaian".*

Perayu-perayu serta responden adalah adik beradik. Pada 2 Oktober 1993, bagi menyelesaikan satu prosiding antara mereka yang masih menunggu penyelesaian, mereka telah menandatangani satu Perjanjian Kompromi (perjanjian) melalui mana mereka berhasrat untuk menamatkan prosiding tersebut. Bagaimanapun, semasa cuba menguatkuasakan perjanjian, satu pertikaian telah berbangkit berhubung dengan pemilihan dan pengasingan syarikat-syarikat yang tersenarai dalam Jadual 1. Berikutnya, menurut fasal 4.5 perjanjian, pertikaian itu telah dirujuk kepada seorang yang bernama Dato' David Teoh untuk timbangtara. Di hadapan penimbangtara, responden telah membangkitkan satu bantahan bahawa penimbangtara tidak mempunyai bidangkuasa untuk melayan permohonan. Bantahan tersebut telah ditolak dan ekoran itu satu awad atas nama perayu telah diberikan, secara berkesannya mengawardkan lima buah syarikat dan sebuah hartanah yang di Kuala Lumpur kepada mereka. Responden merasa terkilan dan dengan itu telah memohon kepada Mahkamah Tinggi untuk mengenepikan award tersebut. Tuan Hakim yang bijaksana, selepas memberikan perjanjian tersebut suatu pentafsiran baru beliau sendiri, memutuskan bahawa penimbangtara telah tersalah dalam beberapa perkara, terutama sekali berhubung dengan pentafsiran betul fasal 4.2 dan 4.5 perjanjian, dan berikutan itu telah mengenepikan award tersebut.

Perayu telah merayu, dan berhujah secara pentingnya, bahawa pentafsiran perjanjian tersebut terangkum dalam bidangkuasa dan hak penimbangtara, dan bahawa ianya adalah dengan itu tidak terbuka kepada Hakim yang bijaksana untuk menggantikan pentafsiran penimbangtara dengan pentafsirannya sendiri. Responden berhujah bahawa penimbangtara tidak mempunyai bidangkuasa untuk

menimbangtara dan dengan yang demikian, award tersebut telah diketepikan dengan betul oleh Mahkamah dibawah.

Diputuskan:

Oleh Abu Mansor Ali HMR (menyampaikan penghakiman Mahkamah):

[1] Melihat perjanjian tersebut secara keseluruhannya, kesemua fasalnya adalah muktamad melainkan Fasal 4.2 hendaklah dibaca bersama fasal 4.5. Pihak-pihak tersebut dengan itu amat mengetahui bahawa mungkin akan terdapat pertikaian dalam melaksanakan fasal tersebut. Mereka dengan itu memperuntukkan penyelesaian bagi kemungkinan itu dalam fasal 4.5 bahawa, sekiranya berlaku pertikaian mereka akan berjumpa dengan penimbangtara yang dinamakan dan keputusan yang diberikan olehnya adalah muktamad. Memberikan maksud yang jelas kepada fasal 4.2 dan membacanya bersama-sama fasal 4.5, tidak dapat diragukan bahawa terdapat pertikaian yang memerlukan penyelesaian menurut fasal 4.5.

[2] Bantahan responden kepada perlaksanaan bidangkuasa oleh penimbangtara adalah terlalu lemah. Tambahan pula, terdapat kegagalan yang jelas di pihak responden untuk memohon bagi mendapatkan satu penggantungan pelaksanaan atau untuk menyatakan satu kes ketiadaan bidangkuasa di hadapan Hakim yang bijaksana kecuali suatu penghujahan umum bahawa penimbangtara tersebut tidak mempunyai bidangkuasa yang sedemikian. Melalui kelakuannya, responden telah juga tunduk kepada bidangkuasa penimbangtara kerana membuat penghujahan di hadapannya. Sememangnya terdapat keterangan yang jelas yang menunjukkan perujukan pertikaian ini kepada penimbangtara yang dinamakan itu.

[3] Hakim yang bijaksana telah tersalah kerana tidak membuat keputusan yang positif dalam penghakimannya bahawa penimbangtara mempunyai atau tidak mempunyai bidangkuasa. Hakim yang bijaksana adalah berkewajipan untuk mengemukakan kepada responden soalan, dan meminta responden melepaskan beban itu, mengenai mengapakah perkara tersebut tidak seharusnya dirujukkan kepada penimbangtara. Walau apapun, kegagalan responden untuk memberikan tindakbalas yang secukupnya dan mencabar dengan cara yang betul akan tuntutan perayu bahawa penimbangtara mempunyai bidangkuasa untuk menimbangtara, telah memudaratkan perayu dan menghalang mereka dari menandingi isu bidangkuasa yang penting itu.

[4] Hakim yang bijaksana telah juga tersalah pertimbangan kerana gagal memberikan jawapan kepada responden mengenai isu bidangkuasa. Mengambil kesemua keadaan yang wujud, jika Hakim yang bijaksana menumpukan perhatiannya kepada persoalan samada penimbangtara mempunyai bidangkuasa, dalam kesemua kebarangkalian, jawapannya tentulah bahawa penimbangtara tersebut telah dianugerahkan dengan

bidangkuasa untuk menimbangtara dan bahawa isu tersebut bukannya untuk beliau.

[5] Tidak terdapat apa-apa pada award tersebut yang menunjukkan apa-apa kesilapan di sisi undang-undang di pihak penimbangtara. Hakim yang bijaksana, dengan itu, telah juga salah kerana merampas fungsi penimbangtara dalam ketiadaan apa-apa kesilapan di sisi undang-undang pada award yang dibuat.

[Rayuan dibenarkan. Penghakiman Mahkamah di bawah diketepikan. Award penimbangtara dipulihkan]

Cases referred to:

Thorburn v. Barnes [1967] Law Reports 2 CP 384 ***(refd)***

Bank Mellat v. GAA Development and Construction Co. [1988] 2 Lloyd's Law Reports 44 ***(refd)***

Attorney-General for Manitoba v. Kelly & Others [1922] 1 AC 268 ***(refd)***

Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn. Bhd. [1991] 2 CLJ 1584, [1991] 3 MLJ 309 ***(foll)***

Gujarat State Co-operative Land Development Ltd. v. PR Mankad & Anor. ***(foll)***

Pearl Hill Sdn. Bhd. v. Trikkon Construction Sdn. Bhd. [1984] 2 CLJ 191 ***(foll)***

Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd. [1994] 2 CLJ 716, [1994] 2 MLJ 97 ***(refd)***

Other source referred to:

"The Law and Practice of Commercial Arbitration in England", Sir Michael J, Mustill and Stewart C. Boyd, 2nd Edn., p. 290

For the appellants - V. Kanalingam (Jothy & W. Satchithanandhan with him); M/s. VK Lingam & Co.

For the respondent - RR Sethu (JC Leong with him); M/s. JC Leong & Saw

JUDGMENT

Abu Mansor Ali JCA:

This is an appeal against the decision of the learned Judge given on 28 June 1995 setting aside the award of the arbitrator of 15 December 1994. After hearing arguments we unanimously allowed the appeal on 24 November 1995 and restored the said arbitrator's award. The respondent appeals against our decision.

Y.B. Datuk V.K. Lingam for the appellant/defendants (hereinafter called 'appellants') submitted that the appellants and the respondent (referred to as 'respondent') are brothers, the respondent being the eldest. To settle a pending proceeding between them, they signed an agreement dated 2 October 1993 (referred to as compromise agreement) which brought about a settlement ending the proceeding between parties.

Counsel for the appellants submitted further that when the parties attempted to bring into effect the compromise agreement a dispute arose relating to the selection by each party of the companies listed in Schedule 1. The appellants' solicitors had the dispute referred to the arbitrator Y.B Dato' David Yeoh, named in the compromise agreement pursuant to Clause 4.5 thereof.

At the arbitration, the respondent raised the point that the arbitrator could not proceed with the arbitration proceeding on the ground, so the respondent alleged, that the arbitrator had no jurisdiction to entertain the application. The arbitrator, however, dismissed the objection and proceeded to give his final award in favour of the appellants which appears at pages 355 and 356 of the Appeal Record, the relevant parts of which are as in paras (1), (2) and (3) thereof as follows:

> The claimants and the respondent wish to proceed to arbitration and Dato' David Yeoh Eng Hock, the designated arbitrator within the meaning of clause 4.5, was appointed to adjudicate on the dispute.
>
> The claimants submitted their claim and their submission contained in a document dated 9 December 1994. The respondent submitted his defence and submission contained in a document dated 13 December 1994, the reply to the respondent's submission dated 14 December 1994, and I, as the arbitrator have considered the aforesaid documents and the submissions contained therein.
>
> Now, I, Dato' David Yeoh Eng Hock, having been appointed arbitrator and having considered the claim, defence and reply to the submissions contained in the aforesaid documents and having read all the documents put before me, I do hereby make issue and publish this my Final Award which is as follows:
>
> (1) I am of the view that there is a dispute within the meaning of clause 4.5 of the Compromise Agreement to be referred to arbitration and therefore I have jurisdiction to adjudicate on this matter.
>
> (2) I award the following companies pursuant to clause 4.5 to the claimants:
>
> (a) Jaya Ternak Sdn. Bhd.;
>
> (b) Spektrum Megah (M) Sdn. Bhd.;
>
> (c) Jiwa Suria Sdn. Bhd.;
>
> (d) Superior Manufacturing Co. Sdn. Bhd.;
>
> (e) Mundaring Enterprise Sdn. Bhd.;
>
> (3) I also award the building and lots nos. 359/361 Jalan Pudu, Kuala Lumpur to the claimants.

The respondent was not satisfied with the arbitrator's award of course. The respondent filed a Notice of Motion R1-25-3-1995 praying to set aside the award of the arbitrator. The learned Judge allowed the respondent' application on

28 June 1994 and set aside the arbitrator's award. As stated above the appellants then appealed.

The learned Judge in allowing the motion of the respondent gave a written judgment in which he held the learned arbitrator has made mistakes and erred in several places in particular the correct interpretation of clause 4.2 thereof. We found it is necessary that we set down the relevant parts of the learned Judge's judgment to be found at pages 37 and 38 of the appeal records as follows:

> 8. After having studied this matter, I have found that the first issue in this application does in actual fact concern the correct agreement of compromise because the source of this matter has been caused by the interpretation which is different from clause 4.2 of the said agreement of compromise by both parties. If the interpretation is in favour of the applicant, then the submission by the applicant is correct and the same is true for the reverse.
>
> 9. In the context of the relevant clause 4.2, I am of the opinion that the choice of the companies as appendixed in First Schedule of the said agreement of compromise has to be made in "sequence", firstly with the applicant choosing companies which he required and afterwards by the three respondents. The words "the Chosen Companies" and "the Remaining Companies" which are used in this clause support this conclusion of mine. The proposition that the choice of the companies should have been made "simultaneously" is not practicable. Also to conclude that the three respondents should have the priority right to make the choice of the companies concerned will render the words "the Remaining Companies" and "the Chosen Companies" meaningless. The terms concerned had been used in the agreement of compromise and agreed upon by both parties who had been represented by their respective Counsels. In view of the term "the Chosen Companies" referring to the companies that had been chosen by the applicant in its ordinary and logical meaning that the applicant is given the priority right to make a choice to pick the relevant companies. Also the term "the Remaining Companies" bears the meaning that the remaining/other companies has to be taken by the three respondents. These words which are clear and straight forward in clause 4.2 have to be interpreted in its ordinary sense. As both parties have been represented by Counsel at the time of signing of the said agreement of compromise, the question that the said term of the said agreement is lop-sided and unfair does not arise.
>
> 10. In the above premises, in weighing the decision of the arbitrator based on the interpretation which has been given above, it is clear that the arbitrator has erred when making his decision which states the existence of a dispute as defined in clause 4.5. He should not have concluded which companies listed the first schedule should have been given to the parties as having been done in his "Final Award".
>
> 11. After having scrutinised the "Final Award" concerned, I am of the opinion that the arbitrator Dato' David Yeoh has made a mistake in carrying

his power under clause 4.5 of the said agreement of compromise. As such I allow this application with costs.

The appellants' Counsel submitted that the learned Judge's finding is attacked on two grounds. Firstly the question of the interpretation of the compromise agreement, Counsel contended is the function of the arbitrator. Learned Counsel in support cited Montague Smith, J. In *Thorburn v. Barnes* [1867] Law Reports 2 CP 384 at page 404:

> Montague Smith, J I am of the same opinion. In answer to this action, the defendant relies upon an award, and he is entitled to succeed unless either of the objections urged against that award is well founded. The first objection urged is, that a dispute as to the true construction of the contract is not such a "dispute arising out of the contract" as was intended by the parties to be submitted to arbitration. It seems to me, however, that such a dispute is entirely within the limits of the submission. It was impossible for the arbitrators to arrive at any conclusion as to the performance of the contract without first ascertaining what were its terms. I cannot for a moment conceive that the parties to this contract did not intend that the arbitrators should settle the whole matter: and I think no persons could be more fit to say what the rules meant than those who framed them, and that it would be most unfortunate if the Court were to come to a different conclusion.

The appellant' Counsel then referred us to *Bank Mellat v. GAA Development and Construction Co.* [1988] 2 Lloyd's Law Report 44 at page 53 and page 54 where Steyn J held:

> ... The proper interpretation of all clauses in a contract, whether spelling out primary rights and obligations, exceptions to liability or limitations of liability, are matters falling within the jurisdiction of an arbitrator. A mistake made by an arbitrator as to the construction of any such clause in a contract cannot amount to an excess of jurisdiction. And that is so whether the proper law of the contract is English law or foreign law. If that is so, why should a mistake as to the applicability of a contractual remedy (which is not excluded by the *lex fori*, the arbitration agreement or the terms of reference) amount to an excess of jurisdiction? ... If one puts on one side the arbitration clause itself, which is in a special position because it is the source of the arbitrator's power, it seems to me that the arbitrator's authority extends to the interpretation of all clauses in the contract. In characteristically terse terms Lord Justice Scrutton once said:
>
> > ... If the arbitrator whom you choose makes a mistake in law that is your lookout for choosing the wrong arbitrator; **if you choose to go to Caesar you must take Caesar's judgment ...** *[African & Eastern (Malaya) Ltd. v. White, Palmer & Co. Ltd. sup.*, at p. 114.]

The appellants' Counsel continuing his submission referred us to the several clauses of the compromise agreement in particular to clause 3.1(c), relating to a transfer of a piece of land to the respondent, clause 3.1(d) relating also to a transfer of land to the respondent in Kelana Jaya, and then regarding

clause 3.2, the transfer of property in London, all these presenting no difficulty whatsoever as and there were finality. The appellants' Counsel submitted, however, the implementation of clause 4 of the compromise agreement, regarding the choice of other companies, brought about disagreement and consequently, as referred to above, the appellant had to refer the dispute to the arbitrator named in the said compromise agreement.

It may be convenient at this stage if we were to set down here the relevant clause 4 of and clause 4.5 of the compromise agreement. It is:

4. Choice of Other Companies By TT Leng and the Transferors

4.1 Within two (2) weeks from the date hereof, the parties shall appoint an independent firm of accountants and an independent firm of valuers which are to be mutually agreed upon by the parties to determine the value of the assets and liabilities of the Other Companies. The decision of such accountants and valuers shall be final and conclusive and shall not be challenged by any of the parties.

4.2 Within one (1) month of the valuations referred to in clause 4.1 being completed and received by the parties, TT Leng shall notify the transferors of those of the Other Companies ("the Chosen Companies") in respect of which he requires the transferors to transfer to him all of the issued and fully paid shares in the capital thereof which are not registered in the name of TT Leng ("the Chosen Shares"), and the transferors shall notify TT Leng of those of the other companies ("the Remaining Companies") in respect of which they require TT Leng to transfer to them all of the issued and fully paid shares in the capital thereof which are registered in the name of TT Leng ("the Remaining Shares"), and forthwith upon such notification being made by the parties (subject to there being no dispute relating thereto which shall be resolved pursuant to clause 4.5), the parties shall exchange the relevant definitive share certificates together with duly executed and registrable transfers thereof.

4.3)

) Not relevant

4.4)

4.5 If there is any dispute under this clause 4 between the parties in any manner whatsoever, the parties shall refer such dispute to Dato' David Yeoh Eng Hock whose decision shall be final and binding and shall not be challenged by any party.

It is common ground that "Other Companies" are companies No. 1 to No. 13 companies appearing in Schedule 1.

The appellants' Counsel submitted that the second ground of attack of the learned Judge's judgment was that the learned Judge erred when he failed to give effect to the crucial words of clause 4.2 of the compromise agreement,

which were "(subject to there being no dispute relating thereto which shall be resolved pursuant to clause 4.5) which was by reference to Dato' David Teoh whose decision shall be final. What had transpired here was that both sides happened to choose some companies which happened to be the same. Hence there was a dispute between them. In accordance with the agreement, the matter was referred to the named arbitrator.

As mentioned the arbitrator proceeded to give his award at page 354 of the appeal record. He held there was a dispute and he acted in accordance with clause 4.5 of the compromise agreement and gave his final award.

Appellants' Counsel submitted further that once the arbitrator had given his interpretation, it is not the Court's function to substitute that interpretation. He submitted that by way of test whether the arbitrator has the jurisdiction to determine the dispute is to ask the question whether the parties can rely and fall on the compromise agreement for the purpose of determining their dispute. If the answer is in the positive both parties can rely on the compromise agreement and the arbitrator has jurisdiction to arbitrate.

Mr. R R Sethu, for the respondent, submitted on three grounds but of the three the most substantive, in our view, was the respondent's allegation that the arbitrator had no jurisdiction to arbitrate. As regards the other two grounds that the matters raised by the appellant before us were not raised in the Court below and that the Pudu land lot 359/361 was not to be included in the arbitration, did not go far to persuade us that arbitrator's award should not be considered. We are satisfied that before the commencement of arbitration there were letters between parties to include in the arbitration the Pudu land in the arbitration. There was therefore submission to arbitration.

Another reason why Mr. Sethu submitted the arbitrator had no jurisdiction to arbitrate was that it was the appellants who invoked the arbitration clause and the respondent did not do so.

Mr. Sethu was at pain to point out to us that at the hearing of the motion before the learned Judge (see page 79 of the appeal record) the respondent's Counsel duly submitted that the arbitrator had no jurisdiction to arbitrate.

The respondent's Counsel also submitted before the learned Judge that, although they attended and submitted before the arbitrator, that itself did not amount to a waiver or estoppel. Respondent's Counsel said, before the arbitrator, in para. 1 of his submission entitled "Defence and Submission of the Respondent" (see page 333 of the appeal record) he similarly submitted:

> 1. The respondent contends that there is no dispute within the meaning of clause 4.5 of the Compromise Agreement to be referred to the arbitrator and the respondent therefore contends that the arbitrator has no jurisdiction to adjudicate in this matter.

Then the respondent's Counsel lastly submitted that, at page 349 of the appeal record, in the respondent's solicitor's letter to the arbitrator dated 13 December 1994, the respondent's solicitors wrote:

> We are of the view that the preliminary issue as to your jurisdiction to arbitrate ought to be decided first, before the merits of the case are considered. **In this regard, we are willing to submit further on the preliminary issue if you deem it necessary.** (The emphasis is ours).

As we have stated without the benefit of hearing further submission, the arbitrator proceeded to hand down his award on 15 December 1994.

The respondent's Counsel in his argument, submitted a number of authorities, the effect of which was the Court has the power to examine the question of jurisdiction of the arbitrator. He cited the Privy Council case of *Attorney-General for Manitoba v. Kelly and Others* [1922] 1 AC 268 at page 275 where Lord Parmoor wrote:

> The jurisdiction of the umpire is derived solely from the agreement of the parties contained in the consent judgment. This document is a written document, which cannot be explained, and much less varied, by extrinsic evidence, of subsequent facts or events. Except so far as the pleadings in the action are of assistance in the interpretation of the document, by showing the surrounding conditions when the agreement was made, none of the evidence adduced before Curran J is admissible or should have been admitted in determining the extent or limitations of the umpire's authority. Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the Court and not with the umpire: *Produce Brokers Co. v. Olympia Oil and Cake Co.* It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties. In the present instance there has been a difference of opinion as to the extent of the jurisdiction which has been conferred by the submission upon the umpire. The majority of the Court of Appeal have adopted a narrower construction than Curran J and Cameron JA.

Mr. Sethu urged on us to look closely at clause 4.2 of the compromise agreement, at page 296 of the appeal record. He submitted the way that clause should be read and be implemented is simply that TT Leng shall notify the other side, the transferors, the list of companies appearing in Schedule 1 that he wanted the shares transferred to him and the other side could do the transfer and the transferors shall notify TT Leng of the shares of companies they want TT Leng to transfer to them which must not be the same companies already chosen by TT Leng. According to Mr. Sethu this is the most reasonable way of interpreting this clause.

We were unanimous in our view that were we to agree to Mr. Sethu's construction, we would not be reading and implementing the clause in the spirit of the compromise agreement. We find merit in the argument of the appellants' Counsel that if we were to read clause 4.2 of the compromise agreement in the way Mr. Sethu asked us to, we would have to ignore the most important of all the qualifications to the choice of companies being made which clause we have referred to above is:

> (Subject to there being no dispute relating thereto which shall be resolved pursuant to clause 4.5).

It is our decided opinion that the words "relating thereto" cannot admit of any other construction other than relating to the choices of companies being made. For the resolution of any dispute whatsoever then clause 4.5 thereof provides:

> 4.5 If there is any dispute under this clause 4 between the parties **in any manner whatsoever**, the parties shall refer such dispute to Dato' David Yeoh Eng Hock whose decision shall be final and binding and shall not be challenged by any party.

We also uphold the submission of Counsel for the appellants that if the compromise agreement is looked at in its entirety there is finality in all clauses except clause 4.2 to be read with clause 4.5. It can be gathered that the parties were quite clear and that they were fully aware and anticipated there could be disputes in their implementation of that clause. They therefore provided for its resolution of that eventuality in clause 4.5, and in the event of dispute surfacing they shall go to a named arbitrator whose decision shall be final. We apply the case of *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn. Bhd.* [1991] 3 MLJ 309, where at 313 Hashim Yeop Sani, CJ approving the case of *Gujarat State Co-operative Land Development Ltd. v. PR Mankad & Anor.* which held "dispute" to be:

> The term 'dispute' means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.

The panel was unanimous in holding that clause 4.2 read with clause 4.5 of the said compromise agreement are all too clear to admit of any ambiguity that in the event that there exist a dispute between the parties requiring a resolution then the parties shall resort to clause 4.2 thereof.

The panel also noted the overwhelming evidence in this case that there was submission of this dispute to the named arbitrator. The respondent's objection to the arbitrator's exercise of his jurisdiction was to say the least feeble. We say that respondent had by conduct submitted to the jurisdiction of the arbitrator by making submission before him. The letter of protest dated 13 December 1994 (see pages 349 and 350 of the appeal record) was written to the arbitrator personally direct without even so much as extending a copy to the appellants

for them to respond. It was only sent after the respondent had made the submission. One would have expected the respondent to be more vigorous and vociferous in his objection by applying for a stay and seeking a direction of the High Court as to the proper future course the arbitration proceedings before him would take but, as stated at page 349 of the appeal record, the respondent only wrote to the arbitrator "We are willing to submit further if you deem it necessary". At that time both parties have already, by their conduct agreed, to give only written submissions and the arbitrator was to rely on those and no oral evidence be given.

As to the correctness of the action taken by the arbitrator, in deciding the question of his own jurisdiction himself, the appellants' Counsel referred us to the learned author's work "*The Law and Practice of Commercial Arbitration in England"*, 2nd Edition by Sir Michael J. Mustill and Stewart C. Boyd (see 288 IAP) at page 290:

> The arbitrator should take care, however, not to carry his enquiries into his jurisdiction too far. He, should confine himself to the more obvious objections. Anything of a more recondite nature should be left for the parties to raise.
>
> If a question is raised on the jurisdiction of the arbitrator, either by a party or by the arbitrator himself, and if the objection is pressed, the arbitrator should see whether the parties will themselves take steps to obtain a final ruling on the question of jurisdiction - by seeking declaratory relief, or by empowering him to decide the matter himself, or to state a case upon it.
>
> If the parties remain inactive, the arbitrator can choose between two procedures -
>
> 1 to decide the question of jurisdiction himself, subsequently continuing or abandoning the arbitration according to what he decides; or
>
> 2 to set the question of jurisdiction on one side, leaving the parties to raise it in Court, either before or after the award has been published.
>
> Which course the arbitrator should adopt will depend on the circumstances. If the objection is straightforward, he may consider it better to rule at once, always bearing in mind that if either party is dissatisfied the matter can be reopened by the Court. On the other hand, if the question of jurisdiction is difficult, or if the hearing on the merits is unlikely to be expensive, so that even a null award will not involve a great waste of costs, the arbitrator may think it better to proceed with the reference, warning the claimant that he goes ahead at his peril.
>
> It not infrequently happens that a party who objects root and branch to the jurisdiction of the arbitrator declines to take any part in the proceedings at all, ...

As we have stated the learned arbitrator, on the face of the apparent submission of the respondent, ruled that there was a dispute; he held had jurisdiction and he made his final award. We have also held that we agree

with the learned arbitrator that giving a clear meaning to clause 4.2 of the compromise agreement and reading it with clause 4.5, it is beyond doubt that there was a dispute requiring a resolution in accordance with clause 4.5 thereof. In the case of *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn. Bhd. (supra)* it was held by the Supreme Court at page 309:

> (1) Once it is established that there has arisen a dispute or difference or question, as provided in the arbitration agreement, the language of s. 6 of the Arbitration Act 1950 places on the plaintiff the burden to show that it ought not to be referred to arbitration.

When we examine the whole conduct of the respondent, there was clearly failure on the part of the respondent to apply for a stay of the arbitration or to submit or to state a case of absence of jurisdiction before the learned Judge, not just merely making a general submission that the arbitrator had no such jurisdiction. If the respondent had done so he would have discharged the burden on him, in the face of the invoking of clause 4.2 by the appellant, that in their view this matter or dispute ought to be referred to arbitration. As stated when the respondent complained to the arbitrator regarding his jurisdiction the letter was not even copied to the appellants.

Finally we are unanimous that the learned Judge had erred in not making a positive ruling in his judgment that the arbitrator had or had no jurisdiction. At page 37 of the appeal record the learned Judge impliedly held there existed a dispute between the parties. The learned Judge, we think on the face of the appellant's invoking the arbitration clause, was bound to correctly apply the *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn. Bhd.'s* case; by which authority he is clearly bound. He was obliged to pose the respondent the question and to require the respondent to discharge that burden as to why the matter should not be referred to arbitration. We think the respondent's failure to adequately respond and to properly challenge the appellants' claim that the arbitrator had jurisdiction to arbitrate, prejudiced the appellants and prevented him contesting that important issue of jurisdiction.

We also hold that the learned Judge erred when he failed to decide and clearly answer the respondent on the issue of jurisdiction. We are unanimously of the view that if the learned Judge had applied his attention to the question of whether the arbitrator had jurisdiction, we are of the view, in all probability, taking all the circumstances into account, his answer would be that the arbitrator had been conferred with jurisdiction to arbitrate and that issue was not for him. We were also again referred to the same textbook *"The Law and Practice of Commercial Arbitration in England"*, even assuming the parties were initially not in a position of any dispute, there can be reference to an arbitrator by the conduct of the parties, for the author at page 125 says:

(c) Disputes arising after appointment of arbitrator

A second consequence of the general rule that only disputes may be the subject of arbitration is that the arbitrator has no jurisdiction over disputes which were not in existence when he was appointed to act. The appointment defines his jurisdiction at the same time as creating it, and cannot be taken to give him jurisdiction over something which does not at that time exist. "A dispute may be created after the arbitration has commenced, either by the defendant for the first time raising a defence to the claim, or by the claimant introducing a new claim into an existing dispute. The first situation raises no practical problems. Initially, the arbitrator has in strict law no jurisdiction over the undisputed claim. **But the conduct of the parties combines to give him jurisdiction: the claimant by bringing the claim before him, and the respondent by raising a defence to it in the arbitration. The arbitrator can therefore properly entertain both the claim and the defence.**

Lastly having anxiously considered this appeal, we are unanimous in our view that, the learned Judge had erred in usurping the function of the arbitrator, in the absence of any error of law on the face of the award. In *Pearl Hill Sdn. Bhd. v. Trikkon Construction Sdn. Bhd.* [1984] 2 CLJ 191. His Lordship Mohd. Dzaiddin J (as he then was), dismissing an application that the award of the arbitrator therein be remitted for reconsideration held, after his examination, thus:

(2) In the circumstances, therefore, the applicant had not shown to the satisfaction of the Court that the award was bad on the face of it. There was nothing whatsoever on the face of the award indicating any error of law on the part of the arbitrator.

Likewise, we unanimously hold that the dispute was properly before the arbitrator by consent and that there is absence of any error of law by the arbitrator on the face of it. It is trite law that it is the duty of the learned Judge to preserve the award unless there was an error of law on the face of it. We fail to find any. It was an award given by an arbitrator agreed to by both parties to a compromise agreement. Both agreed that that particular clause 4.2 dispute, if any, would be resolved by a named arbitrator whose decision shall be final. Clearly there was a dispute and one party brought the dispute before the named arbitrator. No Court would or should allow the other party to renege on it. The other party must be bound by the decision of the arbitrator as he had agreed to be so bound.

If the respondent had been so bold as to apply for a stay, we are confident, he would have been opposed and met by a judgment such as the judgment of His Lordship Tan Sri Edgar Joseph Jr. SCJ (now FCJ) in *Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 MLJ 97 where at page 112 he stated:

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> It is well known that if a party can satisfy the Court that the conditions for the grant of a stay under s. 6 of the Act are satisfied, it does not *ipso facto* follow that he will be entitled, as of right, to a stay, for the Court still retains a discretion to refuse it. But, generally, as the Judge rightly recognized, the approach of the Court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B. in *Wickham v. Harding* [1859] 28 LJ Ex. 215, 'A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so.

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We therefore set aside the judgment of the learned Judge for reasons given in this judgment and hereby restored the award of the arbitrator with cost here and below.

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Reported by W.A. Sharif

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